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IN THE

Supreme Court of the United States

October Term, 1965

No. 1003

LOIS BETTY BOUNDY,

Petitioner,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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To the Honorable Earl Warren, Chief Justice of the United States and to the Associate Justices of the Supreme Court:

Petitioner, Lois Betty Boundy, respectfully prays for a Writ of Certiorari to the Supreme Court of the State of California to review its judgment, without opinion, denying hearing, thereby affirming the judgment of the District Court of Appeal of the State of California, Second Appellate District, Division 1, which affirmed the judgment of conviction, rendered by a jury, in the Superior Court of the State of California, for the County of Los Angeles.

Opinions Below.

The trial in the Superior Court was by a jury.

The opinion of the District Court of Appeal is Appendix A of the Certified Copy of the Petitions for Hearing in the Supreme Court of the State of California.

Grounds on Which the Jurisdiction of This Court Is Invoked.

Jurisdiction of this Court is conferred by 28 U.S.C. 1257(3).

Questions Presented for Review.

1. Where an accused has become the focus of the investigation, taken into police custody, interrogated without being advised effectively or otherwise, of her absolute constitutional right to remain silent or her right to the presence of counsel at every stage of the proceedings and incriminating statements are received which are used against the accused at the time of trial, were the defendant's constitutional rights violated?

2. Where petitioner, after accusation and arrest, was permitted by police to contact counsel by telephone and the police are aware that counsel is in the process of securing petitioner's release, does an interrogation of the petitioner outside the presence of counsel constitute a violation of her constitutional rights?

3. May a waiver of constitutional rights by the defendant be presumed without an express finding by the court?

4. Should *Escobedo v. Illinois*, 378 U.S. 478 (1964), be given retrospective application?

Constitutional Issues Involved.

Involved are the Sixth and Fourteenth Amendments to the United States Constitution.

Statement of the Case.

Defendant, a 60 year old woman, was a bookkeeper, director and treasurer of Dakota Engineering, a California corporation, wholly owned by Frank De Bartolo. She was charged with embezzling approximately $45,000.00 from the corporation during the period May 1, 1962 to April 30, 1963. Receipt of the money was admitted. It was shown that the funds came to her by company check, duly signed by two officers which was deposited to her account in the same bank in which the company had its account. The defense contended that one of the signators was the owner who thereby authorized the transfer of the funds to defendant for his own reasons and his consent was based upon the personal relationship between the parties.

On May 28, 1963, after receiving information from the company accountant and after checking the company and bank records, the police arrested defendant at her apartment [R. T. 287-288]. Statements were taken from the defendant at that time, her apartment was searched, and before being taken to the police station, she was permitted to call counsel by telephone [R. T. 290]. At the police station in Culver City, she was interrogated until counsel arrived with an order for her release several hours later [R. T. 328-358]. During this time,

the officers had obtained approximately two hours of tape recording of questions and answers which was used at the time of trial [R. T. 291-359]. The gist of the recording was an expansion and elaboration of the statements made to the police at the apartment.

The jury found the defendant guilty as charged on October 15, 1963.

An appeal was taken to the District Court of Appeal of the State of California, Second Appellate District, Division 1, on November 12, 1963. Petitioner raised the questions herein posed for the first time in her closing brief, filed November 17, 1964, after the report of the Supreme Court of the State of California in the case of *People v. Dorado,* 61 A.C. 892, 40 Cal. Rptr. 264; first opinion, was filed on August 31, 1964. The District Court affirmed the judgment.

The Supreme Court of the State of California, without opinion, denied a hearing on February 3, 1965.

A remittitur was issued by the District Court on February 9, 1965 affirming the judgment.

ARGUMENT.

I.

Were Defendant's Constitutional Rights Violated at the Time of Arrest?

Defendant relies upon *Escobedo v. Illinois,* 378 U.S. 478, 84 S. Ct. 1758 (1964), in which this court held that the accused was denied "the assistance of counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the states by the Fourteenth Amendment" where the investigation focuses on a particular suspect, the suspect has been taken into police custody, the police interrogation lends itself to eliciting incriminating statements, the suspect requested but was denied an opportunity to consult with his lawyer, and the police have not effectively advised him of his absolute constitutional right to remain silent. Under such circumstances, no statement elicited by the police during the interrogation may be used against him at the trial.

Among the facts in *Escobedo,* which resulted in the above ruling, were the following:

1. Escobedo was arrested and interrogated without making any statement.

2. He had retained an attorney who had obtained his release.

3. He had been re-arrested and while in custody saw his attorney in another room. The attorney waved to and petitioner waved back to the attorney. Petitioner testified that he "took it upon his own to think that the lawyer was telling him not to say any-

thing" and that the lawyer "wanted to talk" to him. He asked for and was denied an opportunity to talk to his lawyer.

4. The petitioner was interrogated outside the presence of his attorney. He was not advised of his absolute right to remain silent. The purpose of the interrogation was to elicit admissions. The petitioner was induced to make statements which were later used against him at the trial.

It may be presumed from petitioner's request for "advice from my lawyer" that the petitioner and his attorney previously discussed the case, and it may be further presumed that petitioner's attorney advised him to make no statement whatsoever (84 S. Ct. at p. 1762, Footnote No. 5). Despite petitioner's understanding of his attorney's admonition and advice and the fact that he did have counsel representing him, this court held that the accused had been denied his constitutional rights.

It is submitted that this case is substantially the same as *Escobedo*. Here, the defendant was the focus of the investigation and had been taken into police custody. She was being interrogated first at her apartment and made incriminating statements which were later used at the time of trial. She had not been advised by the police, effectively or otherwise, of her absolute constitutional right to remain silent or her right to the presence of counsel at all times and at all proceedings. At the time of the first interrogation at the apartment, petitioner had not yet contacted counsel. Thereafter, she was permitted to call counsel by telephone. She was questioned at the station and incrim-

inating statements were elicited. The statements made this second time were an elaboration of what had already been admitted. The recording tapes, transcripts and the officers' testimony were admitted into evidence. These facts bring this case squarely within the proscription of the *Escobedo* case.

II.

Where the Proceedings Are Accusatory and the Police Know That an Accused Is Represented by Counsel, Is an Interrogation of the Accused Outside the Presence of Counsel a Violation of Her Constitutional Rights?

In *Massiah v. United States*, 377 U.S. 210 (1964), the defendant had retained counsel and had already been released on bail. The conviction was reversed as a denial of the basic protections of the Sixth Amendment

> "when there was used against him at his trial evidence of his own incriminating words, which Federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel".

In *Escobedo, supra*, the conviction was reversed because the court admitted into evidence defendant's incriminating statements voiced during defendant's preindictment interrogations in the absence of counsel. The time of the statement, then, is no longer critical. The common element in both cases is the "absence of counsel". Thus, when the proceeding has become accusatory and the agents of the state seek to elicit incriminating statements from an accused, the presence of counsel is essential. Such a statement brings this area of crim-

inal procedure in line with other areas of our law. For example:

1. All substantive procedures are open and are noticed to opposing counsel. All depositions and discovery proceedings are the same way. Here, we are dealing with a far more critical area. The real purpose of the interrogation is not merely discovery but for the purpose of a confession to be used at the time of trial.

2. In civil litigation, it would be a serious breach of ethics for a lawyer representing one side of a case to communicate and question the adverse party without at least notification to the lawyer for the adverse party. This rule should apply with even greater vigor to a criminal case. In *Escobedo,* citing *People v. Donovan,* 13 N.Y. 2d 148, this court approved the following:

   "The court observed that it 'would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the state, to extract a confession from the accused while his own lawyer, seeking to speak with him was kept from him by the police'." Are not the police merely the investigating arm of the District Attorney's office in these cases? Should the District Attorney be permitted to do indirectly, through police officers, what it would be "incongruous" for him to do directly?

3. The constitutional rights granted by the Sixth Amendment are basic and fundamental. In the abstract, they are meaningless. They are meaningful only when open, obvious and acted upon by all parties, particularly governmental author-

ity. The police should not be permitted to circumvent these basic rights by their own procedures. It should not be assumed that these rights are waived. At the very least, there should be an open hearing in the Trial Court and a finding by the Trial Court that the defendant knew of his rights, was advised of his rights effectively, and intelligently, intentionally and knowingly waived them.

4. An accused is entitled to police protection and the presumption of innocence. The only justification for the procedures herein condemned is the result obtained, that is, the judgment of guilt. Results have never justified improper procedures and this court has not hesitated to reject the results of improper police procedures, *i.e.*, wiretapping cases, search and seizure cases, coerced confession cases, etc. In this area of right to counsel and induced admissions or confessions, the same public policy against surreptitious, "closed door" action by police authority should require rejection of the evidence thus obtained. The Bill of Rights does not leave in the hands of the police the power to decide who has earned the right to be treated as an American citizen and who should be deprived of his right to fair treatment and the due process of law.

5. The *ex parte* interrogation of an accused is not necessary. Generally, the police already have sufficient evidence available to them, the proceeding has become "accusatory" and the purpose of the induced confession or admissions is the convenience of trial. If the evidence they have is in-

> sufficient, it may require additional effort on their part. This is the proper way. Police convenience has never been equated to basic constitutional rights of citizens. As stated in *Escobeda,* "If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."

If it is true that the presence of counsel is necessary at the time of the hearing in court, and if it is also true that "most confessions are obtained during the period between arrest and indictment", it would follow that the presence of counsel is necessary at every stage of the proceeding against an accused and whether the proceeding is before a Court, a Deputy District Attorney or a police officer. The deliberate attempt on the part of the police officers to avoid the presence of counsel and their obvious effort to take advantage of the time lag between the arrest and the time necessary to obtain an order for the release of the defendant is clearly a denial of defendant's right to counsel as provided in the Sixth Amendment.

A guiding principle should not depend for its efficacy on speed, physical proximity or technical procedures. If advice and presence of counsel is important, it is precisely at the time of interrogation. The subtleties, imagination and talent of an experienced investigator far surpasses the capabilities of a distressed and disturbed layman to protect himself. In Los Angeles, it takes literally hours to obtain an order to release an accused and then that order must be served on the officers holding the accused wherever their station may be.

In these intervening hours, is it to be the principle of constitutional protection of the accused that the police may interrogate without counsel present and use the words of the accused to "hang" him? If that be so, we have an unequal contest weighted against an accused contrary to the principle of constitutional protection stated by this Court in *Escobedo,* 84 S. Ct. at page 17, "Our Constitution . . . . strikes the balance in favor of the right of the accused".

The right to counsel means the right to counsel's presence at every stage of the proceeding. It is respectfully submitted, therefore, that the rule of law to be stated by this court should be: When the prosecution begins to focus on the accused, the prosecution may not secure admissions from the accused in the absence of counsel unless the rights to counsel and to remain silent are found to be clearly, knowingly and intelligently waived.

III.

May a Waiver of Constitutional Rights by Petitioner Be Presumed Without an Express Finding by the Trial Court?

A waiver should not be presumed without compelling evidence indicating that it was clearly, understandingly and intelligently made. In *Escobedo,* this court refused to assume a waiver, despite the fact that petitioner was represented by counsel and had understood that he was "not to say anything". Quite the contrary.

> "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and would not presume acquiescence in the loss of fundamental rights". *Johnson v. Zerbst* (1938), 304 U.S. 458.

In this case, we have a woman of advanced years, with limited education, highly emotional, who had undergone tremendous emotional stress during the previous several days. She was alone in police custody and in an interrogation room confronted by three experienced police officers waiting for her attorney to bail her out. She had no prior experience with police authority and was deliberately being elicited to make incriminating statements by carefully framed questions designed to assure admissibility into evidence of the resulting answer, and all being done in the period of time required by the procedures of the court and the Police Department for counsel to be away in order to obtain her release. There had been no discussion of what petitioner could or should do in the event of an extended interrogation or even what it might be possible for her to do in the face of her emotionally upset condition [R. T. 335]. From such facts, it is submitted, there was no waiver of constitutional rights.

IV.

Should Escobedo Be Given Retrospective Application?

California Penal Code, Section 1237, states that

> "An appeal may be taken by the defendant: 1. From a final judgment of conviction; a sentence or an order granting probation shall be deemed to be a final judgment within the meaning of this section".

In this case, sentence was pronounced on November 12, 1963 [C. T. 12]. Notice of appeal was filed the same day. *Escobedo* was decided June 22, 1964. The first *Dorado* decision, *supra,* was decided in California

August 31, 1964. The questions here presented were submitted to the District Court in petitioner's closing brief on November 17, 1964. It is apparent that an objection in the Trial Court would have been a useless act. Further, the issue was raised directly on appeal at the earliest possible moment and not collaterally, that is, by Petition for Writ of Habeas Corpus. At the time of trial, the definitive ruling on the question of law had not yet crystallized. Therefore, it is contended that the issue was raised in an appropriate and timely manner and may, and should, be considered on this appeal.

The California Supreme Court has recently considered this question. *In re Lopez and Winhoven,* 62 A.C. 380, 42 Cal. Rptr. 188 (January, 1965). This case arose as a Petition for Writ of Habeas Corpus after the California Supreme Court had affirmed the conviction of the defendant in 1963 (60 Cal. 2d 223) and certiorari was denied by this court (*People v. Lopez,* 375 U.S. 994). The court held,

> "Whether or not Lopez' incriminating statements were improperly admitted under either Massiah or under Escobedo and Dorado, we hold that Massiah may not serve as the basis for collateral attack upon judgments which have become final before the date upon which the United States Supreme Court rendered that decision, nor may Escobedo or Dorado be applied to cases which have become final prior to the date that the United States Supreme Court rendered the Escobedo decision."

The court does not appear to distinguish between direct and collateral attack on a final judgment. It recognized and cites a number of cases in which this court

"has applied retroactively on collateral attack its decisions requiring procedural fairness at criminal proceedings". The Court states at page 194 (42 Cal. Rptr.)

> "The Escobedo rule did not, however, emanate from the inherent unreliability of the confessions introduced in the trials of the past or from the uncertainty of the guilt of those who had thus confessed; it emerged from the belief that secret interrogation was the source of coercion, that the opportunity for the presence of counsel would end the secrecy and that the exclusion of the confession obtained without such opportunity would deter those tactics. The court sought to discourage oppressive police practices."

It is true that the decision would tend to discourage oppressive police practices. However, it is also true that a confession obtained under circumstances herein described is of questionable reliability. As this court stated in Escobedo,

> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable".

It is a two-headed attack, practical and moral. To refuse a retroactive application of a constitutional right simply because it is newly defined permits undue weight to be given to the fortuities of time, court calendars and the advent of particular cases.

This court has not yet ruled on this issue. It is submitted that the rules enunciated by this court in *Escobedo* could and should be properly applied to the type of situation herein presented.

Conclusion.

The Petition for Writ of Certiorari should be granted and the judgment reversed.

Respectfully submitted,

I. GLOVIN,

Attorney for Petitioner.